

APPENDIX S

FEBRUARY 25, 1998

BOARD OF VETERANS APPEALS' RESPONSES TO QUESTIONS FROM THE
SPECIAL INVESTIGATION UNIT ON GULF WAR ILLNESSES

**RESPONSES TO QUESTIONS FROM THE SPECIAL INVESTIGATIVE UNIT,
SENATE COMMITTEE ON VETERANS' AFFAIRS**

1. Will a claim for service connection be considered for undiagnosed illness even if it is not specifically claimed by the veteran but instead is found elsewhere in the record such as in post service medical records?

Response:

Generally, the Board's jurisdiction is limited to issues which are properly before it based on the substantive appeal. See generally 38 C.F.R. §§ 20.200-20.204 (relating to commencement and perfection of appeal). (There is an exception, in 38 C.F.R. § 19.13(a), which permits the Chairman and/or Vice Chairman to approve the assumption of appellate jurisdiction of an adjudicative determination which has not become final in order to grant a benefit.)

Should the Board notice an issue which was reasonably raised by the claimant but not adjudicated by the agency of original jurisdiction (AOJ), it is the Board's practice, in its decision on the appeal, to "refer" that issue to the AOJ without taking jurisdiction. In other words, the Board cannot "remand"--as that term is used in 38 C.F.R. § 19.9--an issue as to which there was no AOJ decision and, hence, over which the Board has no jurisdiction. The Board can, however, point out to the AOJ issues which deserve the AOJ's decision.

If, in reviewing an appeal by a Persian Gulf War theater veteran, the Board noticed the presence of reasonably raised claim for service connection for undiagnosed illness which had not been adjudicated by the regional office, it would be the practice of the Board to refer that matter to the regional office for adjudication under 38 C.F.R. § 3.317.

2. If yes to 1., if such a claim (found in the record but not brought up for service connection by the veteran) is remanded to the RO for consideration--is it remanded as an "inferred issue"?

Response:

As discussed above, such a claim would not be within the Board's jurisdiction. The law requires that a specific claim be filed in order for benefits to be paid or furnished to any individual. 38 U.S.C. § 5101(a). If in fact there was absolutely no claim by the veteran for the condition--i.e., it was in no way "reasonably raised"--the Board could take no action. At the same time, if the claim was in fact "reasonably raised" but not adjudicated by the regional office, the claim would be referred--not "remanded"--to the regional office for adjudication.

"Inferred issue" is a term that, as far as we can determine, appears only in the VBA Adjudication Manual M21-1, Part VI, ¶ 3.10. (The term was mentioned in Akles v. Derwinski, 1 Vet. App. 118, 121 (1991), in reference to a prior version of M21-1.) The Board is not bound by VBA manuals, 38 C.F.R. § 19.5, and does not remand issues as "inferred issues."

3. How many remands were for this reason?

Response:

As discussed in our response to Question 1, a reasonably raised issue not adjudicated by the regional office would result in a referral, not a remand, because the Board would have no jurisdiction. The Board does not, however, track referrals to regional offices. We cannot answer your question.

4. Recently, 2-6-98, VBA and VHA put out guidelines for examining Gulf War vets.

- a. Will this be binding on BVA esp. relative to requiring specialist exams on all symptoms, abnormal physical findings, and abnormal lab results? See paragraph 5-6.

Response:

Strictly speaking, the Board is bound in its decisions only by the regulations of the Department, instructions of the Secretary, and the precedent opinions of VA's General Counsel, 38 U.S.C. § 7104(c), as well as the precedential decisions of courts of competent jurisdiction. The Board is not bound by Department manuals, circulars, or similar administrative issues, including VBA-VHA memoranda. 38 C.F.R. § 19.5.

We intend to circulate this memorandum to our Board members. It is likely that, in cases remanded for a medical examination in this area, Board members will refer to these guidelines in crafting the remand order.

- b. Did the BVA participate in drafting this?

Response:

The Board did not participate in the drafting of the VBA-VHA memorandum.

*Prepared by the Office of the Chief Counsel
Board of Veterans' Appeals
February 24, 1998*

§ 19.1

19.77—19.99 (Reserved)

Subpart E—Simultaneously Contested Claims

- 19.100 Notification of right to appeal in simultaneously contested claims.
- 19.101 Notice to contesting parties on receipt of Notice of Disagreement in simultaneously contested claims.
- 19.102 Notice of appeal to other contesting parties in simultaneously contested claims.

APPENDIX A TO PART 19—CROSS-REFERENCES

AUTHORITY: 38 U.S.C. 501(a), unless otherwise noted.

SOURCE: 57 FR 4104, Feb. 3, 1992, unless otherwise noted.

Subpart A—Operation of the Board of Veterans' Appeals**§ 19.1 Establishment of the Board.**

The Board of Veterans' Appeals is established by authority of, and functions pursuant to, title 38, United States Code, chapter 71.

§ 19.2 Composition of the Board.

The Board consists of a Chairman, Vice Chairman, Deputy Vice Chairmen, Members and professional, administrative, clerical and stenographic personnel. Deputy Vice Chairmen are Members of the Board who are appointed to that office by the Secretary upon the recommendation of the Chairman.

(Authority: 38 U.S.C. 501(a), 512, 7101(a))

[61 FR 20448, May 7, 1996]

§ 19.3 Assignment of proceedings.

(a) *Assignment.* The Chairman may assign a proceeding instituted before the Board, including any motion, to an individual Member or to a panel of three or more Members for adjudication or other appropriate action. The Chairman may participate in a proceeding assigned to a panel of Members.

(Authority: 38 U.S.C. 7102)

(b) *Inability to serve.* If a Member is

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another Member (in the case of a proceeding or motion assigned to a panel).

(Authority: 38 U.S.C. 7101(a), 7102)

[61 FR 20448, May 7, 1996]

§ 19.4 Principal functions of the Board.

The principal functions of the Board are to make determinations of appellate jurisdiction, consider all applications on appeal properly before it, conduct hearings on appeal, evaluate the evidence of record, and enter decisions in writing on the questions presented on appeal.

(Authority: 38 U.S.C. 7102, 7104, 7107)

§ 19.5 Criteria governing disposition of appeals.

In the consideration of appeals, the Board is bound by applicable statutes, regulations of the Department of Veterans Affairs, and precedent opinions of the General Counsel of the Department of Veterans Affairs. The Board is not bound by Department manuals, circulars, or similar administrative issues.

(Authority: 38 U.S.C. 501(a), 7104(c))

§ 19.6 [Reserved]**§ 19.7 The decision.**

(a) *Decisions based on entire record.* The appellant will not be presumed to be in agreement with any statement of fact contained in a Statement of the Case to which no exception is taken. Decisions of the Board are based on a review of the entire record.

(Authority: 38 U.S.C. 7104(a), 7105(d)(4))

(b) *Content.* The decision of the Board will be in writing and will set forth specifically the issue or issues under appellate consideration. Except with respect to issues remanded to the agency of original jurisdiction for further development of the case and appeals which are dismissed because the issue has been resolved by administrative action or because an appellant seeking nonmonetary benefits has died while the appeal was pending, the decision will also include separately stated find-